IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

Nos. 79-4, 79-5, 79-491

JASPER F. WILLIAMS, *et al.*,
Appellants,
v.
DAVID ZBARAZ, *et al.*,
Appellees.

JEFFREY MILLER, *et al.*,
Appellants,
v.
DAVID ZBARAZ, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellant,
v.
DAVID ZBARAZ, *et al.*,
Appellees.

MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE*, THE WASHINGTON LEGAL FOUNDATION

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MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Washington Legal Foundation, Inc. moves, pursuant to Supreme Court Rule 42, for leave to file the annexed brief *amicus curiae* in the above-captioned proceedings.

Consent to the filing of the brief has not been obtained from counsel for Jeffrey Miller, *et al.*, appellants.

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF seeks to advance the interests of unborn fetuses and the right of Congress and of the states to promote childbirth. WLF finds that supporting appellants in the instant cases is within the public interest.

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. The present parties in these cases are primarily concerned with the end results of this lawsuit. None of the litigating parties is primarily focusing upon general questions of whether federal and state governments should subsidize most abortions. WLF's sole concern in these cases is to support the right of Congress and state legislatures to take a pro-life position and refuse to assist, except in extreme cases, in the abortion process.

Abortion is one of the most controversial social issues facing America today. Strong emotions have been raised by those opposed to or supportive of the concept of legal abortions. Although abortions have been legalized,

debate continues over the wisdom of that action. Much has been written about providing a woman freedom of choice concerning abortions. It is just as significant to permit legislative bodies, as representatives of the people, to choose the extent of their abortion funding. A popular desire to curtail state participation in and encouragement of most types of abortions should not be cast aside lightly. WLF seeks to defend expressions of this desire, such as the Hyde Amendment, from constitutional attack.

Accordingly, the Washington Legal Foundation respectfully requests leave to file the annexed brief *amicus curiae*.

Respectfully submitted,

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INTERESTS OF *AMICUS CURIAE*, THE WASHINGTON LEGAL FOUNDATION, INC.

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Abortion is one of the most controversial social issues facing America today. Strong emotions have been raised by those opposed to or supportive of the concept of legal abortions. Although abortions have been legalized, debate continues over the wisdom of that action. Much has been written about providing a woman freedom of choice concerning abortions. It is just as significant to permit legislative bodies, as representatives of the people, to choose the extent of their abortion funding. A popular

desire to curtail state participation in and encouragement of most types of abortions should not be cast aside lightly. WLF seeks to defend expressions of this desire, such as the Hyde Amendment, from constitutional attack.

ARGUMENT

I.

ILLINOIS IS PERMITTED BY THE MEDICAID TITLE OF THE SOCIAL SECURITY ACT TO RESTRICT FUNDING OF ABORTIONS TO EXTREMELY LIMITED CIRCUMSTANCES.

The issue of the legality of abortion operations was settled by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973). However, the consequences of that decision have led to litigation which continues to this day. Of particular concern to the instant case is the Illinois statute P.A. 80-1091, Ill. Rev. Stat. Supp. (1977) ch. 23, §§ 5-5, 6-1, 7-1.[1]

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[1] Those sections provide, in relevant part:

Sec. 5-5. The Illinois Department, by rule, shall determine the quantity and quality of the medical assistance for which payment will be authorized, and the medical services to be provided, which may include all or part of the following: . . . but not including abortions, or induced miscarriages or premature births, unless, in the opinion of the physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.

Section 6-1. Nothing in this Article shall be construed to permit the granting of financial aid where the purpose of such aid is to obtain an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life

[footnote continued]

This statute was enacted by the Illinois legislature in 1977. The act basically provides for the elimination of state medical assistance funding for all Illinois abortions excepting those "necessary for the preservation of the life of the woman" requesting the operation.[2] The statute was the product of the concern felt by the Illinois legislature (and shared by many state legislatures) over subsidizing an admittedly legal activity (abortion operations) which ran counter to its pro-fetal life orientation.

A national expression of pro-life sentiment has appeared in Congress' approval of the Hyde Amendment to the Medicaid provisions of the Social Security Act.[3] The Hyde Amendment was initially enacted in 1977 as a rider

of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.

Section 7-1. Aid in meeting the costs of necessary medical, dental, hospital, boarding or nursing care, . . . except where such aid is for the purpose of obtaining an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a viable child and such procedure is necessary for the health of the mother or her unborn child.

[2]P.A. 80-1091, ch. 23, § 5-5.

[3]Labor-HEW Appropriations Act, Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978) (current version at Pub. L. No. 96-86, § 118 (Oct. 12, 1979)). The Hyde Amendment provides that:

None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting

[footnote continued]

to the Department of Health, Education and Welfare budget. Subsequent riders appeared in 1978 and 1979, indicating steady Congressional interest in restricting abortion expenditures.

These cases center around interpretations of the Medical Assistance Program (Medicaid) which was established in 1965 by Title XIX of the Social Security Act.[4] Medicaid is a joint federal-state medical plan which is operated by the states within federal guidelines. This system of "cooperative federalism"[5] is designed to provide medical care for the poor. State participation is voluntary but once Medicaid is adopted, the state must care for the "categorically needy" (e.g., the aged or blind) and "medically needy" (individuals deemed to need medical assistance).[6] The Medicaid funds are employed in a number of categories of treatment; e.g., physician services.[7]

physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

The provision for abortion funding where severe physical health damage would occur to the mother without an abortion was eliminated by Congress in 1979.

[4]Social Security Act of 1965, Title XIX, Pub. L. No. 89-97, 79 Stat. 344, 42 U.S.C. §§ 1396 *et seq.* (1976).

[5]*See Dandridge v. Williams*, 397 U.S. 471, 478 (1970).

[6]Categorically needy persons are described in 42 U.S.C. § 1396a (a)(10) (1976). Medically needy persons are defined in 42 U.S.C. § 1396a(a)(10)(C)(i) (1976).

[7]Definitions are found at 42 U.S.C. §§ 1396a(a)(10); (13)(B); (13)(C); 1396d(a)(1)-(5) (1976). *See D___ R___ v. Mitchell*, 456 F.Supp. 609, 617 (D. Utah 1978); *Beal v. Doe*, 432 U.S. 438, 440-41 (1977); Norman, *Beal v. Doe, Maher v. Roe, and Non-Therapeutic Abortions: The State Does Not Have to Pay*, 9 Loy. U.L.J. (Chicago) 288, 293-95 (1977); Note, *Indigent Women—What Right to Abortion?*, 23 N.Y.L. Sch. L. Rev. 709, 716-17 (1978); Note, *Medicaid and the Abortion Right*, 44 Geo Wash. L. Rev. 404, 404-07 (1976).

States have a great deal of discretion in their administration of the Medicaid program. However, there are limits: "(1) the plan or standard adopted by a state must be reasonable; (2) Medicaid funds must be distributed equally and equitably among Medicaid recipients; and (3) the plan or standard must be consistent with the objectives of Title XIX."[8] A state is allowed to place "appropriate limits" to services provided such as only medically necessary operations.[9]

Title XIX does not use the term medically necessary; instead "necessary medical services" is employed.[10] The goal of the Medicaid program is to enable qualified recipients to receive necessary medical services. *Amicus* contends that the life-endangering abortion funding standard of Illinois is in line with Medicaid's purpose.

Unfortunately, Congress, in the Medicaid Act, did not define what was meant by necessary medical services. Litigation has resulted, including the instant cases, in attempting to reconcile Medicaid's intentions with legislative pro-life sentiments.

After the 1973 *Roe v. Wade* decision, courts grappled with the issue of whether states could, under Medicaid, disallow payments for elective abortions.

The major case dealing with that issue was *Beal v. Doe*, decided by the Supreme Court in 1977. *Beal* dealt with a Pennsylvania regulation eliminating Medicaid funding for non-therapeutic abortions. An examination of Title XIX

[8] *D__ R__ v. Mitchell*, 456 F.Supp. at 618. *See Beal v. Doe*, 432 U.S. at 444; 42 U.S.C. §§ 1396a(a)(17), (a)(10)(1976); 45 C.F.R. § 249.10(a)(5)(i) (1979).

[9] 45 C.F.R. § 249.10(a)(5)(i) (1979). *See D__ R__ v. Mitchell*, 456 F.Supp. at 617-18.

[10] 42 U.S.C. § 1396; 42 U.S.C. § 1396a(a)(10)(C)(i) (1976).

by the Court found no requirement that states must fund all abortions. The Court noted, "[a]lthough serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage [which is not the case with the Illinois statute], it is hardly inconsistent with the objectives of the Act for a State to refuse to fund *unnecessary*—though perhaps desirable—medical services."[11] Exclusion of non-therapeutic abortions had a rational basis in Pennsylvania's interest in promoting childbirth.[12]

The *Beal* Court used the term non-therapeutic to mean the types of abortion operations illegal in the majority of states before *Roe v. Wade*. In these states, abortions were justified only to save the mother's life.[13] *Amicus* suggests that the words therapeutic and medically necessary mean the same thing. Both describe the only event which will justify Iilinois' Medicaid funding.[14] Although some federal courts have used a broad definition of medically necessary to strike down statutes like Illinois'

[11] *Beal v. Doe*, 432 U.S. at 444-45, 447. *See Roe v. Norton*, 522 F.2d 928, 935-37 (2d Cir. 1975); *Roe v. Ferguson*, 515 F.2d 279, 283 (6th Cir. 1975). The Court also emphasized that Congress, in originally setting up Medicaid in 1965, could not have possibly meant to mean to mandate coverage for non-therapeutic abortions as such operations were unlawful in most states. As late as 1973, over 30 states barred non-therapeutic abortions. *D__ R__ v. Mitchell*, 456 F.Supp. at 622-23. *See also* Norman, *supra* note 7, at 299; Note, *Medicaid*, *supra* note 7, at 410-11.

[12] *Beal v. Doe*, 432 U.S. at 445-46.

[13] *Roe v. Wade*, 410 U.S. at 118.

[14] *See D__ R__ v. Mitchell*, 456 F.Supp. at 623.

as a violation of Title XIX,[15] *Amicus* urges that the narrow definition articulated in *Roe v. Wade* and *Beal v. Doe* be continued.

A narrow definition, interchangeable with the term therapeutic, would more adequately describe the results of judicial rulings and Congressional legislation.

The passage of the Hyde Amendment has served to give a fuller indication of Congressional intent concerning the extent of Medicaid funding. The Amendment's narrow view of medically necessary abortion operations is quite like the Court's view of therapeutic operations in *Wade* and *Beal* and should be given significant attention. The fact that the Hyde Amendment was a rider to an appropriations act rather than a direct amendment of Title XIX should not diminish its importance.[16]

Judge Anderson observed in the *Mitchell* case:

> [T]his court, infers from the above references from the Supreme Court rulings that the restrictive life-endangering standard of the Hyde Amendment under the rules of construction that apply, is the clearest indication of what category of abortions may be covered by the Medicaid Act. At least, it seems evident the Hyde Amendment was not inconsistent with the requirements of Title XIX.

456 F.Supp. at 624.

Title XIX permits Illinois to fund only medically necessary abortion operations. This standard has been shown to be functionally equivalent to the Supreme Court's therapeutic funding requirement. Illinois, then,

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[15] *See Preterm, Inc. v. Dukakis*, 591 F.2d 121 (1st Cir.), *cert. denied sub nom. Preterm v. King*, ___ U.S. ___ (1979); *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979); *Roe v. Casey*, 464 F.Supp. 487 (E.D. Pa. 1978); *Coe v. Hooker*, 406 F.Supp. 1072 (D. N.H. 1976).

[16] *D___ R___ v. Mitchell*, 456 F.Supp. at 624.

may restrict abortion funding to life-endangering circumstances without falling afoul of Title XIX. Illinois did not act arbitrarily in enacting its restrictions. *Amicus* will further discuss the rationale behind the state statute on page 13 of this brief.

II.

THE ILLINOIS GENERAL ASSEMBLY AND THE UNITED STATES CONGRESS MAY LIMIT FUNDING FOR ABORTIONS WITHOUT VIOLATING THE UNITED STATES CONSTITUTION.

Amicus has previously noted that the Illinois statute restricting Medicaid abortion funding does not run afoul of any statutory impediments created by Title XIX of the Social Security Act. Likewise, *Amicus* will demonstrate that neither the Illinois law nor the Hyde Amendment run contrary to either the Due Process clause of the Fifth Amendment or the Fourteenth Amendment's Equal Protection Clause.[17]

A. The constitutionality of the Hyde Amendment and the corresponding Illinois statute should be reviewed under the rational basis standard.

Over the course of this century, the Supreme Court has formulated a number of theories to test the constitutionality of particular legislative statutes. One such test involves strict scrutiny of laws regulating suspect classifi-

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[17] Pertinent portions of each amendment are:

Fifth Amendment: No person should ". . . be deprived of life, liberty, or property, without due process of law . . . ."

Fourteenth Amendment: ". . . nor shall any State deprive any person of law; nor deny to any person within its jurisdiction the equal protection of the laws."

cations (such as race) and fundamental interests (such as marriage). Only a compelling state interest can survive a strict scrutiny examination by the Court.

Counsel for the original plaintiffs (*Zbaraz, et al.*) in the instant cases have argued that the constitutionality of both the Illinois statute and the Hyde Amendment should be tested with strict judicial scrutiny. This is due to the laws creating a "substantial impediment to poor women's obtaining medically necessary abortions."[18] The fundamental right of women to obtain an abortion is said to be infringed by the elimination of most State and Federal aid. Indigent women are "forced" to have children instead of abortions.[19]

However, indigency alone has never been declared to be either a suspect classification or affecting a fundamental right.[20] Indigency in an abortion context was examined by the Supreme Court in *Maher v. Roe* in 1977. This case involved a Fourteenth Amendment equal protection attack of a Connecticut regulation which provided for reimbursements for childbirth expenses but not non-therapeutic abortions. The Court upheld the validity of the Connecticut rule.[21]

Justice Powell, in his majority opinion, noted that:

> The Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund

[18] *Zbaraz v. Quern*, 469 F.Supp. 1212, 1217 (N.D. Ill. 1979).

[19] *Id.*, at 1216-17.

[20] *See Maher v. Roe*, 432 U.S. 464, 471 (1977); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17-18 (1973).

[21] *Maher v. Roe*, 432 U.S. at 470-71.

> childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.

Maher v. Roe, 432 U.S. at 474. *Amicus* stresses that the Illinois statute at issue in *Zbaraz* has much the same impact on an indigent woman as the above discussed Connecticut regulation.

It has been observed that:

> The economic limitations upon the procurement of abortion, where they truly exist, are not created by government, but rather by private physicians who demand fee guarantees prior to the surgery . . . . As long as the state imposes no barriers to the right, it cannot be obligated to break down private ones . . . . To argue that, when a private physician demands payment in advance from his patient, a state which does not meet his demand is using programs "to limit abortions" or to "unlawfully impinge" upon the patient's rights, is to ignore both reality and stare decisis.

Hardy, *Privacy and Public Funding: Maher v. Roe as the Interaction of Roe v. Wade and Dandridge v. Williams*, 18 Ariz. L. Rev. 903, 911-12 (1976) (footnotes omitted).[22]

A woman's decision concerning abortion involves the fundamental right of privacy.[23] Statutes which have

[22] *See D__ R__ v. Mitchell*, 456 F.Supp. at 614.

[23] *Roe v. Wade*, 410 U.S. at 152-53.

infringed this declared right have been struck down.[24] However, this right is not absolute. At times, the state interest in health and medical regulation will prevail and abortions may be restricted.[25] In the area of abortion funding, the Supreme Court has remarked that a woman's right to an abortion (at least before fetal viability):

> . . . protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.
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> * * *
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> . . . There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.

Maher v. Roe, 432 U.S. at 473-75 (footnote omitted). In short, where fundamental rights are not involved, "reasonable" state (or federal regulations are permitted.[26]

State or federal encouragement of childbirth, through the non-application of Medicaid funds for non-medically necessary or non-therapeutic abortions, does not infringe upon an indigent woman's constitutional right to decide upon an abortion.[27] Therefore, the strict scrutiny

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[24] *See Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Planned Parenthd. of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Doe v. Bolton*, 410 U.S. 179 (1973).

[25] *Roe v. Wade*, 410 U.S. at 154, 155, 163; *Doe v. Bolton*, 410 U.S. 179, 189 (1973).

[26] *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

[27] *Woe v. Califano*, 460 F.Supp. 234, 235 (S.D. Ohio 1978). *Accord: Poelker v. Doe*, 432 U.S. 519, 521 (1977).

standard of constitutional review is inapplicable to the instant cases. A number of federal cases involving the constitutionality of state abortion funding restrictions and the Hyde Amendment have resulted in the non-application of the strict scrutiny standard, including the District Court in the instant cases.[28]

Amicus suggests the use by the Court of the traditional equal protection rational basis test. *Amicus* will explain in the following subsection that the Illinois statute and the Hyde Amendment have a rational basis and are constitutional.

B. Preserving fetal life constitutes the most important rational basis for legislative statutory preference.

The rational basis equal protection test requires that a state statute or regulation be "'rationally related' to a 'constitutionally permissible' purpose," *Maher v. Roe*, 432 U.S. at 478, in order to be constitutionally valid. The test can also be applied to federal laws challenged under the Fifth Amendment's Due Process Clause.[29]

The Supreme Court has definitively declared that:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."

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[28] *Zbaraz v. Quern*, 469 F.Supp. at 1217-18. *See, e.g., Woe v. Califano*, 460 F.Supp. at 235-36; *Doe v. Mundy*, 441 F.Supp. 447, 450-52 (E.D. Wis. 1977).

[29] *Ass'n of Am. Physicians & Surgeons v. Weinberger*, 395 F.Supp. 125, 141 (N.D. Ill.), *aff'd*, 423 U.S. 975 (1975); *Richardson v. Belcher*, 404 U.S. 78, 84 (1971).

Dandridge v. Williams, 397 U.S. 471, 485 (1970). Actions by a legislature will be assumed valid.[30] In addition, "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

The District Court in *Zbaraz* found that statutory restrictions of abortion funding such as the Hyde Amendment did not serve a rational basis and so were unconstitutional.[31] *Amicus* urges that legitimate and important state interests do exist which act to justify abortion funding restrictions.

One rational basis for Medicaid abortion funding restrictions lies in the interests of Congress or a state legislature in allocating scarce financial resources. The courts have recognized that legislatures should have wide discretion in determining funding priorities.

Justice Stewart, in a relatively recent opinion, observed:

> The basic principle that must govern an assessment of any constitutional challenge to a law providing for governmental payments of monetary benefits is well established. Governmental decisions to spend money to improve the general public welfare in one way and not another are "not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Helvering v. Davis*, 301 U.S. 619, 640 [1937] . . . .

Mathews v. de Castro, 429 U.S. at 185.

The actions of Congress and the Illinois legislature restricting Medicaid abortion funding are by no means an arbitrary product of the legislative will. Involvement in a controversial subject like abortion does not produce light-hearted or whimsical responses by those elected representatives of the American people.

There are limits to judicial monitoring of legislative conduct. The Court has declared, "the Constitution does not provide judicial remedies for every social and economic ill."[32] Nor does the Court anymore employ the Fourteenth Amendment to invalidate state laws which "may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955).[33] We are warned that "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court." *Dandridge v. Williams*, 397 U.S. at 487. For those favoring changes in legislative policies towards abortion funding, the proper locus is not the legal system but a resort to the electoral process.[34]

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[30] *See Wash. v. Confederated Bands & Tribes*, 439 U.S. 463, 99 S.Ct. 740, 762 (1979); *Vance v. Bradley*, 439 U.S. 907, 99 S.Ct. 939, 943 (1979); *Zbaraz v. Quern*, 469 F.Supp. at 1218; *Maher v. Roe*, 432 U.S. at 478; *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 314, 316 (1976) (1976); *Mathews v. de Castro*, 429 U.S. 181, 185 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 769–71 (1975); *Legion v. Richardson*, 354 F.Supp. 456, 459 (S.D. N.Y.), *aff'd sub nom. Legion v. Weinberger*, 414 U.S. 1058 (1973); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

[31] *Zbaraz v. Quern*, 469 F.Supp. at 1219–21.

[32] *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

[33] *See Maher v. Roe*, 432 U.S. at 479; *Dandridge v. Williams*, 397 U.S. at 484–85.

[34] *See D__ R__ v. Mitchell*, 456 F.Supp. at 626; *Maher v. Roe*, 432 U.S. at 479–80. *Accord: Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. at 488.

A federal court in Utah, in upholding the constitutionality of the Hyde Amendment and a Utah statute similar to Illinois', emphasized that:

> States have wide latitude in the disbursement of their limited funds, and this court cannot compel the State of Utah to provide payment for an indigent woman's exercise of her right to terminate her pregnancy when Utah has chosen by deliberate legislative processes not to do so. Persons in this country have many rights which they may exercise freely in the sense that a government cannot prohibit the exercise of the respective rights. This does not mean, however, that the government has a corresponding duty to *fund* the exercise of that right.
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> * * *
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> . . . If the State of Utah, under *Maher,* may make a choice favoring childbirth over abortion and implement that decision through the allocation of public funds, it may do so on any reasonable conditions.

D__ R__ v. Mitchell, 456 F.Supp. at 615.

A state's economic interest in not funding abortions has been attacked as being irrational. Funding abortions, say these courts, is less expensive than encouraging childbirth.[35]

However, new studies have provided evidence which can support a fiscal interest in restricting abortions. One scholar has opined:

> Abortions do, as a general rule, consume a lesser amount of medical resources than do deliveries. When viewed at the systems level, a different result may be obtained. The cost of a systematic provision

[35] *E.g., Zbaraz v. Quern,* 469 F.Supp. at 1218–19.

> of free abortion may be considerably higher than the cost of a system of free delivery, due to a tendency of low cost abortion to encourage reliance on abortion as a contraceptive, and due to long term complications on future deliveries.

Hardy, *Privacy and Public Funding* at 926–27 (footnotes omitted).

Repeated use of free abortions as a means of contraception and the cost of a substantial number of long term complication abortion cases (who may require future medical treatment) may create significant costs for a state Medicaid program. In addition, abortion operations may represent "a serious drain on medical resources. Domestic hospitals have reported difficulties in providing adequate care for present patients and in preventing personnel fatigue brought on by abortion caseloads. Staff morale has also been a problem." Hardy, *Privacy and Public Funding* at 930–31 (footnotes omitted).

Hence, *Amicus* advocates that economic considerations may be a rational basis to legislatively restrict abortion funding.

Another rational basis, of prime importance, is the state's (or Congress') interest in encouraging childbirth and protecting the potential life of the fetus. The courts have acknowledged this ancient state interest numerous times.[36]

This interest may be expressed by a jurisdiction in any number of ways. A state (or Congress) may encourage childbirth out of simple pro-life sentiment and a desire to protect fetal life (which is but potential human life)

[36] *E.g., Woe v. Califano,* 460 F.Supp. at 237; *Maher v. Roe,* 432 U.S. at 478; *Poelker v. Doe,* 432 U.S. at 521; *Beal v. Doe,* 432 U.S. at 446.

in all but the most extreme circumstances. Another factor might be the need to maintain an appreciable population growth rate to ensure economic prosperity or even survival of the human race. These "concerns are basic to the future of the State and in some circumstances could constitute a substantial reason for departure from a position of neutrality between abortion and childbirth." *Maher v. Roe,* 432 U.S. at 478 n.11. These legitimate state concerns should not be considered terminated merely by the participation of Illinois in the Medicaid program.[37]

Therefore, *Amicus* maintains that a legislative desire to favor childbirth over abortions in terms of Medicaid funding for the purposes of protecting fetal life and promoting live births forms the rational basis required for upholding a statute's constitutionality.

CONCLUSION

Title XIX of the Social Security Act has established a voluntary Medicaid system operated by states with federal funding assistance. Member states like Illinois may restrict funding to medically necessary operations. As the Title XIX's term "medically necessary" has a similar meaning to the courts' use of "therapeutic operations," this would be the only situation where funding is mandated by the courts. A state may restrict abortion funding to life-endangering situations.

The correct constitutional standard of review for the Hyde Amendment and corresponding Illinois statute is the rational basis test. The strict scrutiny standard is

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[37]*See D__ R__ v. Mitchell,* 456 F.Supp. at 626; *Beal v. Doe,* 432 U.S. at 446.

inapplicable as the statutes' effects on indigent women do not infringe fundamental rights or create a suspect classification through invidious discrimination.

Rational bases for statutes restricting Medicaid abortion funding include economic desires to save public funds, a desire to preserve fetal life and to encourage childbirth.

The pro-life aspects of the Hyde Amendment and Illinois' corresponding statute represent strong state interests which richly deserve the presumption of rationality. By reversing the District Court's decision, this Court is in a position to reaffirm its stand against unnecessary judicial interference with the legislative process. A product of the democratic political system should not be invalidated without a compelling reason, a reason not discoverable in the instant cases.

Respectfully submitted,

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